



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 986

[Doc. No. AMS-SC-17-0039; SC17-986-3 FR]

Pecans Grown in the States of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas; Establishment of Reporting Requirements and New Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation made by the American Pecan Council (Council) to establish reporting requirements under the Federal marketing order for pecans (Order). These reporting requirements will enable collection of information from handlers on: Pecans received; pecans purchased outside the United States; shipments and inventory of pecans; pecans exported by country of destination; and pecans exported for shelling and returned to the United States. This information will be used to provide important statistical reports to the industry, meet requirements under the Order, and to help guide future marketing efforts.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail: Jennie.Varela@ams.usda.gov or Christian.Nissen@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Agreement and Order No. 986, (7 CFR part 986), regulating the handling of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and

Texas. Part 986 (referred to as "the order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) has exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017 titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, pecan handlers are subject to assessments. Funds to administer the Order are derived from these assessments. The reporting requirements established herein will be applicable to all assessable pecans beginning October 1, 2017.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an Order may file with USDA a petition stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not in accordance with law and request a modification of the Order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule establishes reporting requirements under the Order. This action will require all pecan handlers to submit to the Council reports on pecans received, shipped, held in inventory, exported for sale or shelling, and purchased from outside the United States. This information will be used by the Council to provide statistical reports to the industry, meet requirements under the Order, and help guide future marketing efforts.

This action was unanimously recommended by the Council at its April 17, 2017, meeting.

Section 2(4) of the Act specifies that one of its stated policies is to establish and maintain orderly marketing conditions for certain agricultural commodities that will provide, in the interests of producers and consumers, an orderly flow of the supply of such commodities to market to avoid unreasonable fluctuations in supply and prices. Section 8(d)(1) of the Act specifies that the Secretary may require all handlers subject to a marketing order to provide USDA with such information as is necessary for it to ascertain and determine the degree to which the agreement has been carried out or effectuated the declared policy of the Act.

Sections 986.75, 986.76, and 986.77 of the Order provide authority to the Council to require handlers to submit reports of inventory, merchantable pecans handled, and pecans received by handlers, respectively, on such dates as the Council may prescribe. Section 986.78 further provides, with the approval of the Secretary, authority for the Council to collect other reports and information from handlers needed to perform its duties. This rule uses these authorities to establish new §§ 986.177 and 986.178

under the administrative provisions of the Order. These new sections will require handlers of pecans to report to the Council on a monthly basis: Pecans received, shipped, held in inventory, exported for sale or shelling, and purchased from outside the United States, using five specific Council forms.

At its November 16, 2016, meeting, the first meeting following the promulgation of the Order, the Council discussed its initial budget, assessment rates, and necessary reporting requirements to establish a program that is efficient and responsive to industry needs. During these discussions, the Council appointed a Statistics and Reporting Committee (Committee) to develop reporting requirements.

Members of the Committee discussed the reporting needs of the industry, reviewed examples of reporting forms from other marketing orders, and met and worked with the staff of another marketing order in developing the proposed reporting requirements. The Committee also worked with USDA to ensure the recommended information collection would provide the information necessary to facilitate the administration of the Order.

At its February 23, 2017, meeting, the Council reviewed drafts of seven reporting forms as developed and recommended by the Committee. The Council expressed its interest in having as much electronic reporting as possible, but recognized that many handlers may prefer a paper submission. The Council also considered the timing of when forms would be due and submission dates that would work for all parts of the industry. After a thorough review and some modifications, seven forms were approved by the Council.

At a meeting on April 17, 2017, the Council revisited the recommended reporting requirements and the accompanying forms. Acknowledging that the industry was more than halfway through the fiscal year at that time, the Council recommended dividing the reporting requirements into the five forms needed beginning with the 2017-2018 fiscal year and the two forms needed beginning with the 2016-2017 fiscal year. The two forms required for the 2016-2017 fiscal year were established in a separate rulemaking action.

This final rule adds five new reporting requirements and five new forms to the administrative provisions under the Order by adding §§ 986.177 and 986.178. During the

formal rulemaking hearing to promulgate the Order, it was stated that the data collection component was one of the most important aspects of the Order. Concerns were also expressed regarding the accuracy and availability of industry data, and the impact those have on making good business decisions.

Currently, most available reports on domestic pecan production are issued annually and often long after the marketing year has been completed. The reporting of this information is currently voluntary, so not all handlers are reporting, which impacts the accuracy of the available information. Some aggregate import and export data are available, but this information is usually available on an annual basis, or reported several months after the shipments have been made. Additionally, some domestic production is shipped outside of the country for shelling and then returned to the United States for sale or further processing. There is concern this volume is not being properly accounted for, and is negatively impacting the accuracy of the industry information currently available.

The Council agreed these reporting requirements would be necessary to develop accurate reports for the industry regarding pecans being produced and handled in the United

States, and recognized the value to the industry of such reports. Having accurate and timely information on the total supply of pecans moving into and out of the country will also assist the industry in managing available supply and in making marketing decisions. Further, collecting this information monthly will allow the Council to provide key data regarding total supply and inventory to the industry in a more timely fashion throughout the season.

The Council also recognized that § 986.65 of the Order requires the Council to provide a report and recommendation to the Secretary on the Council's proposed marketing policy for the next fiscal year. The report is required to include, in part, an estimate of production; improved, native, and substandard pecans; handler inventory; and trade supply, taking into consideration imported pecans. In addition to providing important information for industry reports, the reporting requirements covered in this action would provide the information needed to develop the marketing policy.

Two specific monthly reporting requirements will be added to the administrative provisions under the Order in a new § 986.177, a summary report of domestic pecans received, and a report of pecans purchased outside the

United States. The summary report of domestic pecans received includes information on the handler submitting the form, the month covered by the report, the total weight and type of inshell pecans received, and the weight by variety of improved pecans received. In addition, the form also includes information regarding total assessments owed and total pounds reported to date.

The information on this form will provide the Council with the volume of pecans received by handlers each month throughout the season. This information will be used to track the available supply of pecans each month, and the overall crop as it is delivered to handlers. The Council will then be able to use the information to develop its own reports that would provide the industry with an overview of market information for the predominant varieties, including volume by variety, which will assist in the development of marketing strategies.

The Council also intends to use this form to facilitate the collection of assessments on a monthly basis throughout the season. Using the form, handlers will be able to calculate their assessments due each month based on the pecans received as listed on the report. Handlers will

be required to pay to the Council the assessments owed on the pecans received by the due date of the summary report.

In its discussion of the report of pecans purchased outside the United States, the Council agreed it would be important to have information regarding the volume of pecans being imported by production area. The monthly report of pecans purchased outside the United States includes the name of the handler importing pecans, the month covered by the report, the date imported, country of origin, volume, and variety of pecans imported.

As production of pecans abroad has increased, there has been an increase in pecans imported into the United States. One Council member stated that the domestic industry is currently shelling and processing as much as 70 to 75 percent of Mexican-grown pecans, and that Mexican pecans now account for nearly 50 percent of sales in the United States. Consequently, having information regarding the volume of imported pecans is essential when calculating available supply. Collecting this information will greatly improve the accuracy of reports to the industry as it includes information regarding both domestic and imported pecans.

One of the Council's main goals in developing these reporting requirements is to deliver to the industry accurate reports regarding the marketplace and supply of pecans to assist the industry in making its marketing decisions throughout the year. The Council believes having accurate information regarding imported pecans is an essential part of reaching this goal. Further, collecting this information will provide the industry with valuable data regarding the timing and volume of pecans imported into the United States. Members also agreed having this information will assist the Council in developing its marketing policy as required under the Order.

Three additional reporting requirements will be added to the administrative provisions in a new § 986.178: Reports of shipments and inventory, exports by country of destination, and inshell pecans exported to Mexico for shelling. The report of shipments and inventory will include information on the handler submitting the form, the month covered by the report, shipments of shelled and inshell pecans, current inventory, and pecans in inventory already committed for shipment.

The Council believes this form will provide beneficial information regarding shipments completed and volume in

inventory. While there is currently some limited information available regarding pecans in cold storage, this information does not delineate between available inventory and inventory that is already committed for shipment. By collecting this information from handlers, this report, in conjunction with the data regarding pecans received, will allow the Council to provide the industry with inventory reports that are more accurate, and that provide a clearer picture of available supply. This data on the available volume of pecans will provide the industry with the information needed to make better marketing decisions.

When discussing a reporting requirement for exported pecans, the Council expressed the industry's need for more information concerning international trade markets and export trends. The report of exports by country of destination includes information on the handler submitting the report, the month of the report, and the weight of all shipments of pecans, inshell or shelled, by classification, and by country of destination.

The Council estimated that prior to 2005, around 10 percent of domestic production was being exported. Since then, exports have grown considerably and now account for

between 40 and 50 percent of production. The recommended form will be used to generate reports throughout the season providing industry members with information on where product is being sold and in what volume. Further, the Council could use this information to determine the effectiveness of any international promotional efforts and to consider opportunities for promotion and market expansion.

Some of the pecans shipped outside the United States are exported just for shelling and then returned to the United States for further use. The Council recommended an additional reporting form to capture this information. Specifically, the Council recommended collecting information on pecans exported to Mexico for shelling and then returned to the United States. The Council decided to limit the reporting to Mexico since the vast majority of pecans exported for this purpose are being sent to Mexico because of its proximity and cost efficiencies. The report of inshell pecans exported to Mexico for shelling includes information on the handler submitting the report, the month covered by the report, dates of shipments, the total weight of inshell pecans shipped for shelling, and the weight of shelled pecans returned to the United States.

In discussing this reporting requirement, the Council recognized that in addition to shelling some pecans from the production area, Mexico also exports pecans to the United States. This makes it difficult to determine how much of the import volume reported from Mexico is represented by domestic product after shelling. It was expressed that without this report, the accuracy of data regarding both reported exported and imported product could be compromised. Pecans exported for shelling could be counted as exports, and then counted again as imports when returned to the United States. This reporting requirement will help reduce the possibility of double counting of these pecans, and will help improve the accuracy of the overall information on supply.

The Council selected the tenth day of the month following the month of the activity as the due date for all five reports. Should the tenth day of the month fall on a weekend or holiday, reports will be due by the first business day following the tenth day of the month. The five monthly reports will be used during the 2017-2018 and subsequent seasons.

This action requires pecan handlers to provide the Council with monthly reports on pecans received, shipped,

held in inventory, exported for sale or shelling, and purchased from outside the United States. By establishing these reporting requirements, the Council will be able to gather and disseminate this information in accurate market reports. Further, this information will be used to create a marketing policy each year as required under the Order.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 2,500 growers of pecans in the production area and approximately 250 handlers subject to regulation under the pecan marketing Order. Small agricultural growers are defined by the Small Business

Administration as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

According to information from the National Agricultural Statistics Service (NASS), the average grower price for pecans during the 2015-2016 season was \$2.20 per pound and 254 million pounds were utilized. The value for pecans that year totaled \$558.8 million (\$2.20 per pound multiplied by 254 million pounds). Taking the total value of production for pecans and dividing it by the total number of pecan growers provides an average return per grower of \$223,520. Using the average price and utilization information, and assuming a normal bell-curve distribution of receipts among growers, the majority of growers receive less than \$750,000 annually.

Evidence presented at the formal rulemaking hearing indicates an average handler margin of \$0.58 per pound. Adding this margin to the average grower price of \$2.20 per pound of inshell pecans results in an estimated handler price of \$2.78 per pound. With a total 2015 production of 254 million pounds, (\$2.78 per pound multiplied by 254 million pounds) the total value of production in 2015 was

\$706.12 million. Taking the total value of production for pecans and dividing it by the total number of pecan handlers provides an average return per handler of \$2,824,480. Using this estimated price, the utilization volume, number of handlers, and assuming a normal bell-curve distribution of receipts among handlers, the majority of handlers have annual receipts of less than \$7,500,000. Thus, the majority (a substantial number) of growers and handlers of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas may be classified as small entities.

This final rule establishes reporting requirements under the Order. This action requires pecan handlers to provide the Council with reports of pecans received, shipped, held in inventory, exported for sale or shelling, and purchased from outside the United States. The Council will use this information to provide important statistical reports to the industry, to meet requirements under the Order, and to help guide future marketing efforts. This rule establishes new §§ 986.177 and 986.178 under the administrative provisions of the Order. The authority for

this action is provided for in Section 8(d)(1) of the Act and §§ 986.75, 986.76, 986.77, and 986.78 of the Order.

Requiring monthly reports of pecans received, shipped, held in inventory, exported for sale or shelling, and purchased from outside the United States will impose an increase in the reporting burden on all pecan handlers. However, this data is already recorded and maintained by handlers as a part of their daily business. Handlers, regardless of size, should be able to readily access and submit this information. Consequently, any additional costs associated with this change would be minimal (not significant) and apply equally to all handlers.

This action should also help the entire industry by providing comprehensive data on pecans received, shipped, held in inventory, exported for sale or shelling, and purchased from outside the United States. Collection of this data was one of the industry's goals in promulgating the Order as there is no other source for this type of data. This information should provide accurate information regarding available inventory, help with marketing and planning for the industry, provide important information for the collection of assessments, and assist with preparing the annual marketing policy required by the

Order. The benefits of this action are expected to be equally available to all pecan growers and handlers, regardless of their size.

The Council discussed other alternatives to this action. The Council considered listing additional varieties on the summary report of pecans received. However, after discussion the Council determined a simpler version with the major commercial varieties and room for handlers to enter additional varieties as needed would be less burdensome. The Council also considered different due dates for these monthly reports, including a due date of the first, the third and the fifth day after the month of the activity. However, after some discussion, it was determined some handlers may have difficulty meeting these time frames. The 15th day of the month was also suggested, but Council members thought this would delay the issuance of reports, and negatively impact their value. Consequently, the Council agreed to set the due date for all five forms at the tenth of the month. The Council also considered the value and importance of each of the forms, and if all should be recommended. However, the Council agreed each of the recommended forms provides important

information for the industry and for administering the Order. Therefore, the alternatives were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this collection has been submitted to OMB with the reference number 0581-NEW. Upon approval, the collection will be merged with OMB No.0581-0291, "Federal Marketing Order for Pecans." This final rule establishes the use of five new Council forms, which impose a total annual burden increase of 2,234.4 hours. The forms, "Summary Report U.S. Pecans Received for Your Own Account," "Pecans Purchased Outside the United States," "Report of Shipments and Inventory on Hand," "Exports by Country of Destination," and "Inshell Pecans Exported to Mexico for Shelling and Returned to the United States as Shelled Meats," require the minimum information necessary to effectively carry out the requirements of the Order. The information would enable the Council to provide statistical reports to the industry, meet requirements under the Order, and help guide future marketing efforts.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule. Further, the public comments received concerning the proposal did not address the initial regulatory flexibility analysis.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Further, the Council's meetings were widely publicized throughout the pecan industry and all interested persons were invited to attend the meetings and participate in Council deliberations on all issues. Additionally, the Council's Committee meetings held February 23, 2017, and April 17, 2017, were also public meetings and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the *Federal Register* on December 4, 2017 (82 FR 57166). Copies of the rule were sent via email to Council members and known pecan handlers. Finally, the rule was made

available through the internet by USDA and the Office of the *Federal Register*. A 60-day comment period ending February 2, 2018, was provided to allow interested persons to respond to the proposal. Two comments were received in support of the proposed information collection. One commenter stated that, while he worried about the cost of pecans going up, he would consider the cost worthwhile if the information made the pecan industry more transparent. The other commenter stated she appreciates that the regulation could help improve the production and transportation of pecans.

Accordingly, no changes will be made to the rule as proposed, based on the comments received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously-mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation of the Council and other available information, it is hereby found that

this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 986

Marketing agreements, Nuts, Pecans, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 986 is amended as follows:

PART 986 - PECANS GROWN IN THE STATES OF ALABAMA, ARKANSAS, ARIZONA, CALIFORNIA, FLORIDA, GEORGIA, KANSAS, LOUISIANA, MISSOURI, MISSISSIPPI, NORTH CAROLINA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, AND TEXAS

1. The authority citation for 7 CFR part 986 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Add § 986.177 to subpart B to read as follows:

§ 986.177 Reports of pecans received by handlers.

(a) Summary report U.S. pecans received for your own account. Handlers shall submit to the Council, by the tenth day of the month, a summary report of inshell domestic pecans received during the preceding month. Should the tenth day of the month fall on a weekend or holiday, reports are due by the first business day following the tenth day of the month. The report shall be

submitted to the Council on APC Form 1 and contain the following information:

- (1) The name and address of the handler;
- (2) The month covered by the report;
- (3) The total weight and type of inshell pecans received, and the weight by variety for improved pecans received during the reporting period;

- (4) The total weight and type of inshell pecans received, and the weight by variety for improved pecans received year to date; and,

- (5) Assessments due on pecans received during the reporting period to be paid by the due date of the report.

(b) Pecans purchased outside the United States.

Handlers shall submit to the Council, by the tenth day of the month, a summary report of shelled and inshell pecans imported during the preceding month. Should the tenth day of the month fall on a weekend or holiday, reports are due by the first business day following the tenth day of the month. The report shall be submitted to the Council on APC Form 6 and contain the following information:

- (1) The name and address of the handler;
- (1) The month covered by the report;
- (3) The date the pecans were imported;

(4) The country of origin; and,

(5) The total weight of shelled and inshell pecans received, and the weight by variety for improved pecans received.

3. Add § 986.178 to subpart B to read as follows:

§ 986.178 Other reports.

(a) Report of shipments and inventory on hand.

Handlers shall submit to the Council, by the tenth day of the month following the month of activity, a report of all shipments, inventory, and committed inventory for pecans. Should the tenth day of the month fall on a weekend or holiday, reports are due by the first business day following the tenth day of the month. The report shall be submitted to the Council on APC Form 2 and contain the following information:

(1) The name and address of the handler;

(2) The month covered by the report;

(3) The weight of all shipments of pecans, inshell and shelled, and inter-handler transfers shipped and received during the reporting period;

(4) The weight of all shipments of pecans, inshell and shelled, and inter-handler transfers shipped and received in the previous month and year to date;

(5) Total inventory held by handler;

(6) All the inventory committed (pecans not shipped, but sold or otherwise obligated) whether for domestic sale or export; and,

(7) The weight of all shelled or inshell pecans under contract for purchase from other handlers.

(b) Exports by country of destination. Handlers shall submit to the Council, by the tenth day of the month following the month of shipment, a report of exports. Should the tenth day of the month fall on a weekend or holiday, reports are due by the first business day following the tenth day of the month. The report shall be reported to the Council on APC Form 3 and contain the following information:

(1) The name and address of the handler;

(2) The month covered by the report;

(3) The total weight of pecans shipped for export, whether inshell, shelled, or substandard during the reporting period;

(4) The total weight of pecans shipped for export, whether inshell, shelled, or substandard during the previous period and year to date; and,

(5) The destination(s) of such exports.

(c) Inshell pecans exported to Mexico for shelling and returned to the United States as shelled meats. Handlers shall submit to the Council, by the tenth day of the month following the month of shipment, a report of all inshell pecans exported to Mexico for shelling and returned to the United States as shelled pecans. Should the tenth day of the month fall on a weekend or holiday, reports are due by the first business day following the tenth day of the month. The report shall be submitted to the Council on APC Form 5 and contain the following information:

- (1) The name and address of the handler;
- (2) The month covered by the report;
- (3) The date of inshell shipment(s);
- (4) The weight of pecans exported for shelling;
- (5) The date shelled pecans returned to the United States after shelling;
- (6) The weight of shelled pecans returned to the United States after shelling; and
- (7) The total weight of inshell pecans exported to Mexico for shelling, and shelled pecans returned from Mexico, year to date.

Dated: February 15, 2018

Bruce Summers

Acting Administrator,

Agricultural Marketing Service.

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